No. 12,415

IN THE

United States Court of Appeals

For the Ninth Circuit

CHIN CHIU FONG and CHIN CHIU CHUNG,
Appellants,

vs.

ARTHUR J. PHELAN, Acting District Director of the Immigration and Naturalization Service, San Francisco District,
Appellee.

BRIEF FOR APPELLANTS.

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JURISDICTIONAL STATEMENT.

Appellants arrived at the port of San Francisco on the 15th day of December, 1948, seeking admission as United States citizens. Their applications for admission as United States citizens were denied by the Immigration and Naturalization Service.

Appellants petitioned the United States District Court in and for the Northern District of California, Southern Division, for a writ of habeas corpus (T 2). The writ was denied by District Judge Michael J. Roche and this appeal followed (T 10-12).

Jurisdiction of the District Court to entertain the petition for habeas corpus is conferred by 28 U.S.C. Secs. 451, 452, 453. Jurisdiction of the Court of Appeals to review the District Court's final order denying habeas corpus is conferred by 28 U.S.C. Sec. 463.

STATUTE AND REGULATION INVOLVED.

The Act of February 5, 1917, as amended (8 U.S.C. Sec. 153), so far as relevant to this proceeding, provides:

> "* * * All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. * * *"

Part 130.2 of Title 8, Code of Federal Regulations (Published 11 F.R. 14232, December 11, 1946) provides *inter alia:*

> "The alien shall also be accorded the right to have one friend or relative present: *Provided,* That, if such friend or relative is a witness, he has already completed his testimony. During the preliminary part of the hearing the alien shall be advised of these rights and there shall be entered in the record the exact language in which he is so advised and of his reply. If the alien desires to have counsel or a friend or relative present, he shall be given a reasonable, fixed period of time within which to arrange for such presence."

STATEMENT OF THE CASE.

The appellants applied for admission to the United States as citizens thereof at the port of San Francisco on December 15, 1948 (T 9). They claim to be the true and lawful blood sons of Chin Yow Kin whose United States citizenship has been conceded by the Immigration and Naturalization Service on numerous occasions (T 3). The appellants were held for examination by a Board of Special Inquiry for determination of their right to entry (T 9). A Board of Special Inquiry hearing was conducted by the Immigration and Naturalization Service (Ex. A).

It is contended by the appellants that the Board of Special Inquiry failed to comply with those provisions of law and regulations which grant substantive rights to persons appearing before such an administrative body.

SPECIFICATION OF ERRORS.

1. That the District Court erred in holding and deciding that the Board of Special Inquiry complied with the Act of February 5, 1917 (8 U.S.C. 153, 39 Stat. 887).

2. That the District Court erred in holding and deciding that the Board of Special Inquiry complied with Part 130.2 of Title 8, Code of Federal Regulations (Published 11 F.R. 14232 December 11, 1946).

3. That the District Court erred in holding that the appellants were given a fair hearing as required

by the "due process of law" clause of the Fifth Amendment to the Constitution of the United States.

4. That the District Court erred in not remanding the case to the Appellee for a hearing *de novo*.

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

The sole question to be determined at this time is whether the Board of Special Inquiry afforded these appellants an opportunity, and gave due and proper notice, of their right to have a friend or relative present during the course of their examination.

THE ACT OF FEBRUARY 5, 1917, AND THE REGULATIONS PROMULGATED THEREUNDER, GUARANTEE PERSONS HELD FOR A BOARD OF SPECIAL INQUIRY HEARING CERTAIN RIGHTS AND PRIVILEGES.

In order to present a clear, logical and concise argument, specification of errors Nos. 1 and 2 will be consolidated for that purpose.

Section 23 of the Act of February 5, 1917 (8 U.S.C. 102, 108) grants authority to promulgate such rules and regulations as may be necessary to carry out the purposes and intent of that act. Under Reorganization Plan No. V (5 U.S.C.A. 133v) such authority was delegated to the Attorney General of the United States. Pursuant to such authority Part 130.2 of Title 8, Code of Federal Regulations, was adopted on December 11, 1946.

Regulations have the force and effect of law. This doctrine was clearly expressed by the lower court in the case of *Hamburg American Lines v. U.S.*, 65 F. (2d) 369, 379, certiorari granted 54 S. Ct. 79, 290 U.S. 615, 78 L. Ed. 538, and affirmed 54 S. Ct. 491, 291 U.S. 420, 78 L. Ed. 887.

In the case of *Panama Refining Company v. Ryan,* 55 S. Ct. 241, 293 U.S. 388, 428, 429, 79 L. Ed. 446, 463, the Supreme Court said:

> "So, also, from the beginning of the Government, the Congress has conferred upon executive officers the power to make regulations,—'not the government of their departments, but for administering the laws which they govern.' United States v. Grimaud, 220 U.S. 506, 517, 55 L.Ed. 563, 567, 31 S.Ct. 480. Such regulations become, indeed, binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined."

Other decisions to similar effect are:

Fok Young Yo v. U. S., 185 U.S. 286, 303, 22 S. Ct. 686, 46 L. Ed. 918, 920;
Haff v. Tom Tang Shee, 63 F. (2d) 191, 193;
Shizuko Kumanomido v. Nagle, 40 F. (2d) 42, 44;
U. S. v. Karnuth, 31 F. (2d) 785, 788;
Sibray v. U. S., 282 F. 795, 798.

It is a well settled criterion of law that where the words of a statute are clear and unambiguous they are to be strictly construed, and the statute must be

given effect according to its plain and obvious meaning. This rule would apply equally as well to rules and regulations that fall within the scope of delegated authority.

U. S. v. Missouri Pacific R. Co., 49 S. Ct. 133, 136, 278 U.S. 269, 277, 278, 72 L. Ed. 322;

Commissioner of Immigration of Port of New York v. Gottlieb, 44 S. Ct. 528, 265 U. S. 310, 315, 68 L. Ed. 1031;

Russell Motor Car Co. v. U. S., 43 S. Ct. 428, 430, 261 U. S. 514, 520, 67 L. Ed. 778;

U. S. v. Standard Brewery, 40 S. Ct. 139, 140, 251 U.S. 210, 217, 64 L. Ed. 229.

For the purpose of applying the foregoing rules of law to the instant case it is necessary to quote for clarification pertinent parts of the preliminary hearing. They are as follows:

Exhibit A, page 87:

"Q. Your right to enter the United States will be considered by this Board and all evidence in your behalf must be submitted at this hearing. You have the right to be represented in this proceeding by an attorney or by any other person admitted to practice before this Service or the Board of Immigration Appeals. Do you wish to be so represented?

A. (by 1-4 and by 1-5). I desire to delay this case until I can write a letter to my father and see what he wants us to do.

Q. (if not). Do you waive your right to representation by counsel in this proceeding?

A.

Q. You are informed that you or your qualified representative have the right in this proceeding to examine any witnesses offered in your behalf, to cross-examine any witnesses called by the Government, to offer evidence material and relevant to any matter in issue, and to make objections which shall be entered on the record. Do you understand?

A. (by 1-4). I understand. (by 1-5). I understand.

Q. You also have the right at this hearing to have a friend or relative present, who, if a witness, must have finished testifying. Do you wish to use this right?

A. (by 1-5). I have a friend, Cheung Yin Kuey, who I would like to have present."

Exhibit A, page 85:

"Q. Just how long do you desire to delay this hearing before you will be able to advise us whether or not you desire to be represented by an attorney or by any other person?

A. I shall notify you immediately after I receive word from my father.

Q. You are advised that it is the desire of this Service to complete these hearing as expeditiously as possible. For that reason you should attempt to contact your father either by airmail or telegram. Do you understand?

A. (by each applicant). I understand.

Q. When this hearing is again resumed you should be in a position to advise this Board as to whether your father and mother and Cheung Yin Kuey will appear here as witnesses in your behalf. Do you understand?

A. (by each applicant). I understand.

Q. You are advised that this Board of Special Inquiry will be recessed in order to give you an opportunity to obtain advise from your father concerning the retention of Counsel. You should immediately let us know when you are ready to proceed with this hearing. Do you understand?

A. I understand. (By each applicant)."

Exhibit A, pages 85 and 84:

"Jan. 7, 1949.

H. H. Carson replaces G. T. Patterson as second member.

(BY MEMBER CARSON). I have familiarized myself with all the testimony and evidence adduced thus far in these cases.

Interpreter, Stephen Louie.

APPLICANTS CHIN CHIU CHUNG AND CHIN CHIU FONG RECALLED TO BOARD ROOM AND ADMONISHED THAT THEY ARE STILL UNDER OATH TO TELL THE TRUTH AND SUBJECT TO THE PENALTIES OF PERJURY.

Q. (Chairman to applicants). Are you the same Chin Chiu Chung and Chin Chiu Fong who last appeared before this Board on December 28, 1948?

A. Yes.

Q. At that time, this Board was recessed in order to give you an opportunity to correspond with your father to find out what he wanted you to do in regard to retaining an attorney. Have you received any word from your father?

A. No. (By Chin Chiu Fong). I wrote a letter to my father on December 28, 1948. The last letter was returned to me yesterday for addi-

tional postage. I wrote to my father again yesterday.

Q. You are advised that this Service has received a letter from Edward Hong, Attorney at Law in New York City, entering his appearance as attorney in these cases and has stated that your parents will testify in New York City. The interpreter will now read you these letters, and each of you are requested to state if you are ready to proceed with your hearing at this time.

A. (by Chin Chiu Fong). Yes. (by Chin Chiu Chung). Yes.

Q. Inasmuch as Attorney Edward Hong is in New York City. It is evident that he will waive his personal appearance at this hearing. Do you understand?

A. (by both applicants). Yes."

(Note. 1-4 relates to appellant Chin Chiu Chung; 1-5 relates to appellant Chin Chiu Fong.)

Discussing first the facts relating to the appellant Chin Chiu Chung, 1-4, we find a complete failure on the part of the Board of Special Inquiry to ascertain whether this subject desired a friend or relative present during the course of his examination. The foregoing quoted testimony shows that this subject was never given an opportunity to answer this question. This is an omission of an essential prerequisite required and established by law and regulation. Chin Chiu Chung was thereby denied a substantive right which is entitled to protection in a court of law.

In the case of Chin Chiu Fong, 1-5, the facts are somewhat different. This subject was asked if he

desired to have a friend or relative present during the course of his examination and he replied in the affirmative, naming a specific individual. The hearing was deferred for an indefinite period for the purpose of affording the applicants an opportunity to consult with their father, then a resident of New York City. Chin Chiu Fong gave the Board a plausible and reasonable excuse for failure to make the necessary arrangements prior to the date of the reconvened board. He stated the letter addressed to his father on the date of the deferred hearing had been returned only the day before and that he immediately addressed another letter to him requesting his advice. The Board of Special Inquiry gave no consideration to his prior request to have a friend present. They did not ask if he still desired to have that friend present. The record shows they arbitrarily waived his substantive rights.

The Supreme Court of the United States has held:

> "The rules are designed to protect the interest of the alien and to afford him due process of law. * * * It was assumed in Bilokumsky v. Tod, 263 U.S. 149, 155, 44 S. Ct. 54, 56, 68 L.Ed. 221, that 'one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.' We adhere to that principle. For those rules are designed as safeguards against essentially unfair procedures." *Bridges v. Wixon,* 65 S.Ct. 1443, 1452, 326 U.S. 135, 152.

Prior decisions of the Federal Courts dealing with the right to have a friend or relative present such as,

United States ex rel. Dong Yick Yuen v. Dunton, 297 F. 447 and *Stone ex rel. Colonna v. Tillinghast,* 32 F.2d 447, are not applicable to the present case. These decisions were based upon departmental regulations in effect at that time. The regulations were not mandatory prior to the recent change enacted in December 1946. They are at this time.

These decisions render full support to the appellants' contention that they have been denied a substantive right, and therefore, a fair hearing.

APPELLANTS WERE NOT GIVEN A FAIR HEARING AS REQUIRED BY THE "DUE PROCESS OF LAW" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is admitted that the decision of the immigration department is final and conclusive unless there has been a denial of a fair hearing, an abuse of discretion, or an error of law.

Quon Quon Poy v. Johnson, 47 S.Ct. 346, 347, 237 U.S. 352, 71 L.Ed. 680.

It has been said that a fair hearing of an alien's right to enter the United States means a hearing before the immigration officers "in accordance with the fundamental principles that inhere in due process of law."

Ex parte Petkos, 212 F. 275, 277.

When an applicant has not been accorded or properly advised of all of these rights there has been an unfair hearing.

United States ex rel. Waldman v. Tod, 289 F. 761, 764, 765.

If an alien has not been accorded the legal rights to which he is entitled under the statutes and rules of the department, *habeas corpus* is the remedy and if the procedure prescribed by law was disregarded, the respondent did not have a fair hearing in accordance with the rules of the department.

Chin Yow v. United States, 208 U.S. 8, 28 S.Ct. 201, 52 L. Ed. 369.

The same rule was expressed by the Supreme Court in the case of *Kwock Jan Fat v. White,* 253 U.S. 454, 464, 40 S.Ct. 566, 570:

> "It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which executive officers proceed to judgment."

Applying other rules of decisions to the present facts we find substantial basis to support the appellants' contention that they have been denied "due process of law". In the case of *Ex parte Soghanalian,* 2 F. (2d) 40, 42, the Court stated:

"Administrative officials may not ignore essential parts of the statutes they are administering."

Similarly, the Supreme Court stated in the case of *Gegiow v. Uhl,* 239 U.S. 319, 36 S.Ct. 2, 60 L.Ed. 114, 118:

"* * * when the record shows that a commissioner of immigration is exceeding his powers, the alien may demand his release upon habeas corpus."

Quoting from *Sibray v. U. S.,* supra, at page 798:

"Aliens must be deported according to law, and not according to men. This statute must be administered according to its terms and the rules established by the Commissioner General of Immigration. Those charged with the enforcement are not at liberty in any particular case, and for reasons that appeal to them at the moment, to set aside any of the rules on which the rights of aliens depend."

The rules of malfeasance and nonfeasance apply to administrative officers. It has been said that:

"* * * when the administrative officers do something outside of the act or omit something required by the act, that judicial interference is warranted."

Prentis v. Cosmas, 196 F. 372, 373.

Also see:

United States v. Williams, 190 F. 686, 687;
Ex parte Gregory, 210 F. 680, 687.

Failure of the Board of Special Inquiry to advise the appellant Chin Chiu Chung in accordance with the mandatory regulations of the department is a

denial of due process of law. This failure did not only result in an unfair hearing but was an arbitrary abuse of its discretion. The appellant Chin Chiu Fong should have been accorded a reasonable opportunity to consult with his father and make the necessary arrangements for the presence of a friend or relative. The Board was not justified in proceeding with his case until there had been a complete compliance with the regulations then in effect. Therefore, the same rules of law are applicable insofar as he is concerned. It is asserted that the Board's action clearly establishes a manifest disregard of a course of conduct established by law and regulation.

APPELLANTS ARE ENTITLED TO A HEARING DE NOVO.

It is concluded, therefore, that under the doctrine as stated heretofore, the appellants have been denied a substantive right guaranteed and protected by the Constitution.

The Board's manifested disregard of the fundamental principles which are protected by the Constitution is so flagrant that such conduct cannot be condoned under any interpretation of law. The arbitrary abuse of the discretionary power granted is so contradictory to the dictates of humanity that it justifies judicial interference. Without the protection of the Courts, intolerance by administrative boards of the rights that inhere in "due process of law" would be rampant.

The appellants are not entitled to release from the custody of the Immigration and Naturalization Service, since authority to determine admissibility is vested in that administrative body. Failure on the part of that service to comply with the prerequisites established by law and regulations makes any subsequent proceedings null and void.

It is asserted that the appellants should be granted a new, fair, and impartial hearing in accordance with law.

PRAYER.

Wherefore, appellants, Chin Chiu Fong and Chin Chiu Chung, pray that a writ issue unless the Immigration and Naturalization Service convenes a hearing *de novo* within twenty days after a decision in this proceeding.

Dated, San Francisco, California,
February 1, 1950.

JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
One of the Attorneys for Appellants.